87-1400

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALBERTO CLAUSELL and PATRICIA CLAUSELL,
Appellants,

vs.

HOBART CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

Whether Florida's statute of repose, § 95.031(2), Fla. Stat. (1985), was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, when retroactively applied to divest the plaintiffs of a cause of action for personal injury which was not barred by the statute either at the time the cause of action arose, or at the time the action was filed.

LIST OF PARTIES

Pursuant to Rules 15 and 28.1 of the Rules of the Supreme Court, the appellants certify that the parties to this appeal are appellants Alberto and Patricia Clausell —plaintiffs in the trial court, appellants in the Florida District Court of Appeal, and petitioners in the Florida Supreme Court; and appellee Hobart Corporation—defendant in the trial court, appellee in the Florida District Court of Appeal, and respondent in the Florida Supreme Court. Hobart Corporation is a Delaware corporation with its principal place of business in Troy, Ohio.*

Pursuant to Rule 28.4(c) of the Rules of the Supreme Court, the appellants hereby recite that 28 U.S.C. § 2403 (b) may be applicable to this case, and that a copy of this jurisdictional statement has been served upon the Attorney General of the State of Florida. To the appellants' knowledge, no court involved in the instant action has certified to the Florida Attorney General the fact that the constitutionality of a Florida Statute is drawn in question.

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*So far as we can determine from published materials, Hobart Corporation is a subsidiary of Hobart-North America Co., which in turn is a subsidiary of Premark International, Inc. Hobart Corporation appears to have no formal relationship with Hobart Brothers Co., also of Troy, Ohio.

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JURISDICTIONAL STATEMENT

Alberto and Patricia Clausell appeal from the decision of the Florida Supreme Court entered December 3, 1987. It holds in relevant part that the retroactive application of Florida's statute of repose, § 95.031(2), Fla. Stat. (1985), was not unconstitutional as violative of the appellants' right of due process.

OPINION BELOW

The opinion of the Florida Supreme Court is reported as *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), and appears in the appendix at A1. The intermediate opinion of the District Court of Appeal of Florida, Third District, which affirmed the trial court's judgment for the defendant, and in turn was approved by the Florida Supreme Court, is reported at 506 So.2d 1160 (Fla. 3d DCA 1987) (per curiam), and appears at A6. The trial court's Summary Final Judgment is not reported, and appears at A9.

JURISDICTION

The Florida Supreme Court's decision, approving the dismissal of the Clausells' personal-injury complaint on the basis of Florida's statute of repose, was entered on December 3, 1987 (A1). The appellants' notice of appeal was filed in that court on January 22, 1988 (A11), within 90 days of its decision. This appeal is being docketed in this Court within the same 90 days.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Pursuant to Rule 15.1(e)(iii) of the Rules of the Supreme Court, we feel it appropriate to

acquaint the Court with the facts and procedural history of this case before addressing the question of this Court's jurisdiction under 28 U.S.C. § 1257(2). We will do so in our Statement of the Case below.

CONSTITUTIONAL PROVISION AND FLORIDA STATUTE

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 95.031(2), Fla. Stat. (1985):

> (2) Actions for products liability under s. 95.11 (3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

STATEMENT OF THE CASE

1. The Chronology of Events.

This is a personal-injury case, in which the Clausells' complaint raised claims of negligence, breach of implied warranty, and strict liability against defendant Hobart Corporation, on the basis of its design and manufacture of a meat-chopping machine, which severed the right hand of Alberto Clausell while he worked at a grocery store in Miami, Florida on September 1, 1983 (R. 1).[1] The trial court held (A9), and both the intermediate appellate court (A6) and the Florida Supreme Court (A1) agreed, that the Clausells' action was barred by Florida's statute of repose, notwithstanding both state and federal constitutional challenges to its application. We will review below the dates which are relevant to the propriety of that determination:

— May, 1969: The meat chopper in question was manufactured and sold by Hobart (R. 42).

— 1975: Florida's statute of repose (enacted in 1974) became law. The statute is quoted above. In relevant part, it provided that notwithstanding any statute of limitations governing actions for product liability, no such action could be brought more than 12 years after the date of the delivery of the completed product to its original purchaser.

— December 11, 1980: The Supreme Court of Florida decided *Battilla v. Allis Chalmers Mfg. Co.*, 392

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1. "R." refers to the Record on Appeal in the Florida Supreme Court. We have not requested that the Clerk of that court certify and transmit the record to this Court under Rule 13 of the Rules of the Supreme Court, but we will do so should any of the factual allegations contained in this Jurisdictional Statement be controverted.

So.2d 874 (Fla. 1980) (per curiam), holding that, as applied to a product-liability action, the statute of repose was unconstitutional, because it "denies access to courts under Article I, section 21, Florida Constitution."

— September 1, 1983: Alberto Clausell was injured while using Hobart's machine (*see* R. 2, R. 10).

— June 7, 1985: Action filed by the Clausells against Hobart (R. 1).

— July 3, 1985: Hobart files its answer to the Clausells' complaint, making no mention of the statute of repose (R. 10).

— August 29, 1985: Florida Supreme Court decides *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), in which "[w]e recede from [*Battilla*] and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution."

— October 23, 1985: Hobart files amended answer (R. 37) and motion for summary judgment (R. 39) based upon the statute of repose, as resurrected by *Pullum*.

— March 19, 1986: Trial court enters final summary judgment for Hobart on the basis of the statute of repose (A9, R. 137-38).

— April 10, 1986: Clausells file notice of appeal to Florida District Court of Appeal (R. 104).

— April 21, 1986: United States Supreme Court dismisses appeal from the Florida Supreme Court's decision in *Pullum*, 475 U.S. 1114 (1986).

— Effective July 1, 1986: The Florida Legislature amended § 95.031(2), to abolish the statute of repose as applied to products-liability cases:

> (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered. Ch. 86-272, § 2, Laws of Florida (1986).

— May 12, 1987: District Court of Appeal of Florida, Third District, affirms the judgment below, while certifying both the state and federal constitutional questions to the Florida Supreme Court. *Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987) (per curiam) (A6).

— October 15, 1987: Florida Supreme Court decides *Melendez v. Dreis and Krump Mfg. Co.*, 515 So.2d 735 (Fla. 1987), rejecting all state-law challenges to the retroactive application of the statute of repose.[2]

— December 3, 1987: Florida Supreme Court approves District Court of Appeals' decision, and

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2. *Accord, Pait v. Ford Motor Co.*, 515 So.2d 1278 (Fla. 1987); *Brackenridge v. Ametek, Inc.*, 12 *Florida Law Weekly* 589 (Fla. Dec. 3, 1987); *Wallis v. Grumman Corp.*, 515 So.2d 1276 (Fla. 1987).

rejects all federal-law challenges to the retroactive application of the statute of repose. *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987) (A1).

2. The Federal Question.

Throughout the proceedings below, the Clausells repeatedly challenged the federal constitutionality of the statute of repose as applied to their cause of action. Their basic contention is that the statute of repose was a nullity —having been declared unconstitutional in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1988) (per curiam)—at the time their cause of action arose and their complaint was filed; that for this reason their cause of action was viable under Florida and federal law; that such a cause of action is a federal property right; and that after its resurrection in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), the statute could not be applied retroactively to divest them of a pre-existing constitutional right.

In the trial court, in their response to Hobart's motion for summary judgment, the Clausells began by asserting that "if the 12 year provision can be applied to the facts of this case, it is violative of Article I, Section 21 of the Florida Constitution and the Equal Protection and Due Process Clauses of the United States and Florida Constitutions" (R. 63). They asserted that "[a]pplication of the 'ultimate repose' provision to the facts in the instant case abolishes the plaintiff's common law rights, and violates the state and federal constitutions" (R. 70, emphasis deleted); that "[t]he language of the statute will support only a literal reading because there is no ambiguity in it which can be resolved to render it constitutional" (*id.*); and that "[i]f the legislature may not constitutionally

abolish the plaintiff's cause of action under the circumstances presented here, then the 'ultimate repose' provision is unconstitutional—period; and it is this court's duty to declare it so" (R. 71).

In granting Hobart's motion for summary judgment, the trial court necessarily rejected these contentions: "There is no dispute that twelve (12) years had elapsed when the subject complaint was filed nor that the accident occurred after the expiration of said twelve (12) year period. The [Florida] Supreme Court did not indicate that its decision in *Pullum* was prospective only and, unless it so limits its decision, every decision is retroactive. . . . Therefore, although the Court has serious misgivings about the efficacy of padlocking the door to the Courthouse after a Plaintiff has suffered injuries, it is not the province of this Court to modify or ameliorate decisions of the Florida Supreme Court" (A10, R. 137-38).

On appeal to the Florida District Court of Appeal, the Clausells emphasized the federal rule "that a statute may not be applied retroactively if to do so would deprive a party of a 'vested right.'" Brief of Appellants at 12, *Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987) (per curiam), *citing William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1924); and they explained that "since the statute of repose was a nullity when the machine caused the injury in this case, and when the Clausells filed their action, they had a vested right in that cause of action, and the retroactive denial of that right would be a violation of the Florida and federal constitutions." *Id.* at 27. They emphasized the limitations upon "the extent to which the legislature may affect a vested right by the retroactive application of a new statute"; that "such interference with vested rights is

constitutionally impermissible"; and that, in construing a statute, "the courts may not constitutionally accomplish what the legislature is forbidden to accomplish—the retroaction usurpation of vested rights." *Id.* at 27.

After the Clausells had filed their initial brief, the district court of appeal rejected state-law claims identical to their own in *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987)—a decision binding upon a panel of the same court in *Clausell.* In this light, the Clausells focused primarily upon their federal claims in their reply brief, emphasizing that under "federal law too, a new statute will not apply to a pending case if such application would interfere with vested rights." Reply Brief of Appellants, *Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987) (per curiam). They repeated that "a cause of action is certainly a vested property right under federal law" (*id.* at 9); and that Hobart had made no showing of a legislative objective sufficiently strong to warrant the retroactive abolition of that right, *id.* at 12: "[E]ven if the *Pullum* decision, and thus the statute of repose, were still in effect, it can hardly be said that its prospective-only application—leaving undisturbed pre-existing vested rights—would undermine some important legislative objective. Hobart must show that the legislature's purpose could only be served by the broadest possible application, including the divestment of theretofore-vested rights. Hobart has not even attempted such a showing."

The district-court panel however, was bound by its earlier decision in *Shaw,* and as in *Shaw,* certified to the Florida Supreme Court the two Florida-law issues—whether the *Pullum* decision should have been construed

to apply the statute retroactively to divest the Clausells of a cause of action which was viable under *Battilla* at the time it arose and was filed; and whether the legislature's abolition of the statute of repose should have revived a cause of action in a case still pending on the effective date of the legislative amendment. 506 So.2d at 1160-61. In addition, and for the first time, at the Clausells' request, the appellate court also certified the federal constitutional question, in the following form, *id.* at 1161:

> Would the application of *Pullum* to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision, deprive the plaintiff of a right of due process guaranteed by the United States Constitution?

3. The Decision Below.

In their brief in the Florida Supreme Court, the Clausells pressed their contention that because of *Battilla*, the Clausells' "cause of action . . . was perfectly viable at the time it arose and at the time it was filed," and "[u]nder both Florida and federal law, such a cause of action is a property right of constitutional dimension, which cannot be divested without some overpowering public necessity." Petitioners' Brief on the Merits at 6, *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987). They found it "no answer to say that *Pullum* resurrected the statute of repose 'ab initio,' because both federal and Florida law are very clear that it did so **only** to the extent that it did not interfere with pre-existing vested rights." *Id.* They devoted several pages to the proposition that "[u]nder federal law, there can be no question that a state-created cause of action is a vested property

right entitled to the protection of the due-process clause of the Fourteenth Amendment." *Id.* at 19; *see id.* at 19-21. They emphasized that "[u]nder federal law, no less than under Florida law, the Clausells had a viable cause of action at the time it arose and at the time it was filed, because *Battilla* had declared the statute of repose unconstitutional." *Id.* at 21. They pointed out "that federal rights may not be divested by federal action —by a new federal statute or judicial decision," and "it is equally settled that when state-created rights become vested **federal** property rights, they are no less entitled to protection against divestment by a state court or legislature." *Id.* at 22. Thus, "[t]he federal rule is that neither a new state statute nor a new interpretive state judicial decision can divest a party of a pre-existing vested right, 'absent a countervailing state interest of overriding significance. . . .'" *Id.* at 23, *quoting Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). They concluded, *id.* at 28: "The *Battilla* decision was the unqualified law of this state at the time the Clausells' cause of action arose and was filed, and there is simply no conceivable justification in Florida's policy—especially since the statute of repose now has been repealed—which the federal courts would recognize as sufficiently important to override federal constitutional rights." And in their reply brief (p. 9) —in response to Hobart's effort to demonstrate the facial validity of the statute of repose—the Clausells answered that the point "may be correct but it is totally irrelevant, because we are concerned here not with the facial validity of a statute of repose, but with its retroactive application to pre-existing vested rights." They thus explicitly reiterated their position that the retroactive application of the statute would be unconstitutional as applied.

In approving the district court of appeal's disposition, the Florida Supreme Court addressed the federal question in the context framed by that court (A3):

> With reference to the third certified question, Clausell argues that the retroactive application of *Pullum* to his cause of action violates his right to due process under the United States Constitution. We find this claim unfounded. Several years ago in *Duke Power Co. v. Carolina Environment Study Group, Inc.*, 438 U.S. 59, 88 (1978), the United States Supreme Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of law.'" *See also Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) ("it is well settled that a plaintiff has no vested right in any claim for damages under state law"). More recently, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court acknowledged that a cause of action is a species of property but pointed out that the state remained free to create substantive defenses or immunities for use in adjudication.

In addition, the Florida Supreme Court relied upon a federal district-court decision which had acknowledged the general principle that " 'a statute may not be retroactively applied to deprive a party of a vested right,' " but had concluded that a cause of action in tort is not such a right. A4, *quoting Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1149 (S.D. Fla. 1986).

4. This Court Has Jurisdiction Under 28 U.S.C. § 1257(2).

The Court has "held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds."[3] In the instant case, this standard is satisfied both because the constitutionality of the statute, as applied, was explicitly raised and rejected in the state system; and because such a claim is inherent in the arguments raised and rejected in the state system.

As we have noted, the Clausells argued at the trial level that "if the 12 year provision can be applied to the facts of this case, it is violative of . . . the Equal Protection and Due Process Clauses of the United States and Florida Constitutions" (R. 63); repeated in the district court of appeal that they "had a vested right in [their] cause of action, and the retroactive denial of that right would be a violation of the Florida and federal constitutions" (initial brief at 27); and emphasized in the Florida Supreme Court that "we are concerned here not with the facial validity of a statute of repose, but with its retroactive application to pre-existing vested rights" (reply brief at

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3. *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 440-41 (1979). *Accord, Cohen v. California*, 403 U.S. 15, 18 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-90 (1921). *See also City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976) (per curiam); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (separate opinion announcing judgment). Both *Dukes* and *Dutton* were decided under 28 U.S.C. § 1254(2), which is directly analogous to § 1257(2). *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 n.9 (1984). For this reason, we will refer to a number of § 1254 cases throughout the following discussion.

9). And in rejecting that claim, the Florida Supreme Court held that the Clausells had no right entitled to federal constitutional protection, while acknowledging that "a cause of action is a species of property," and " 'that a statute may not be retroactively applied to deprive a party of a vested right . . . .' " A4, *quoting Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986).[4] Thus, even if the Clausells had not themselves directly raised the point, it is clear that the Florida Supreme Court addressed it, and that alone is sufficient to invoke § 1257(2): "[W]hether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."[5]

In addition, such a holding is inherent in the arguments raised and rejected in the state system. There are cases, of course, in which § 1257(2)-jurisdiction can only be based upon contentions explicitly raised and rejected, because the outcome of the lower court's ruling is explicable in terms outside the reach of the jurisdictional statute. For example, in *United States v. Christian Echoes Nat. Ministry, Inc.*, 404 U.S. 561, 563-66 (1972) (per curiam), in the absence of any argument or judicial

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4. As this Court has recognized, the lower tribunal may explicate its reasoning not only through its own words, but through the authorities upon which it relies: "[T]he court's discussion of the case and its citation of authorities proceed as if it were considering the identical claim of invalidity that was presented in the Appellate Division and there denied. Among the citations are several decisions of this court dealing only with clauses from the Fourteenth Amendment." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 69 (1928).

5. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). *Accord, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975); *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-86 (1945) (dictum). *Cf. Raley v. State of Ohio*, 360 U.S. 423, 436 (1959).

discussion of statutory invalidity, the lower court's decision might be read to hold that the statute in question could be narrowly construed to avoid the constitutional question, and thus had been improperly enforced. Similarly in *Wilson v. Cook*, 327 U.S. 474, 481-82 (1946), "[s]ince the collection of a tax by a state officer, as here, may or may not offend against the Constitution, independently of the constitutionality of a statute . . . the state court, in holding the state tax constitutional, did not necessarily pass on the constitutional validity of the statute."[6]

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6. *Accord, Calder v. Jones*, 465 U.S. 783, 788 n.7 (1984) (state long-arm statute construed by state courts to be as broad as the constitution; could not have been upheld against a constitutional challenge); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980) (constitutional challenge merely attempted "to limit the exercise of the discretion conferred by the statute in the trial judge"), citing *Phillips v. United States*, 312 U.S. 246, 252 (1941) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority"); *Kulko v. Superior Court of California in and for City and County of San Francisco*, 436 U.S. 84, 90 n.4 (1978) (since state long-arm statute had been construed by state courts to be as broad as the constitution, appeal was improper "regardless of the terminology in which the petitioners couch their jurisdictional defense"); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 717 (1961) (state court avoided question of constitutionality of state statute assertedly allowing discrimination by public facilities, by finding no state action); *Hanson v. Denckla*, 357 U.S. 235, 244 & n.4 (1958) (challenge to constitutionality of state's exercise of long-arm jurisdiction not necessarily a challenge to the long-arm statute as applied, because the statute might be construed to forbid the exercise as well); *Raley v. Ohio*, 360 U.S. 423, 434-35 (1959) (despite state court's reliance on a state immunity statute in holding that no privilege of self-incrimination was available, since the validity of that statute had not been challenged in the state courts, reversal of the conviction on due-process grounds was consistent with leaving the immunity statute intact both on its face and as applied); *Flournoy v. Wiener*, 321 U.S. 253, 255, 260-63 (1944) (alternative adequate state ground for state court's decision); *Stickney v. Kelsey*, 209 U.S. 419 (1908) ("The best that can be said for the plaintiffs in error is that the action of the [state] court was ambiguous").

On the other hand, when the rejection of a claim of constitutional invalidity is inherent in the lower court's ruling, § 1257(2) has never required of the litigants or lower courts the incantation of "some abracadabra." *Flournoy v. Wiener*, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting). While the statute does require that "the decision must have been against the claim of invalidity . . . it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1927). As the Court noted in *Harding v. State of Illinois*, 196 U.S. 78 (1904):

> [I]f the Federal question appears in the record in the state court, and was decided, or the decision there was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here.
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> • • •
>
> If the question was necessarily decided, notwithstanding the failure or refusal of the state court to expressly and in terms pass upon the matter, the case might be brought here.

Chief Justice Marshall made the same point in an analogous context:

> Undoubtedly the plea might have stated in terms that the act . . . was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the

question, and the only question, which could have been discussed in the state Court. That question must have been discussed and decided.

> The plaintiffs sustain their rights . . . by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.[7]

In a variety of contexts, therefore, the Court has assumed § 1257(2)-jurisdiction as inherent in the lower court's disposition of the case.[8]

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7. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829). *See also California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982) ("Finally, § 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' that the lower court granted"), *quoting United States v. Clark*, 445 U.S. 23, 26 n.2 (1980); *Street v. New York*, 394 U.S. 576, 581-82 (1962) ("Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction"); *Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba County*, 116 U.S. 410, 415-16 (1886) (issue "necessarily involved" in decision); *Furman v. Nichol*, 75 U.S. (8 Wall.) 44, 56 (1868) ("If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches"). *Cf. Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921) ("[N]either does it matter on what ground the court upheld and enforced the statute").

8. *See, e.g., Local 926 International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675 n.7 (1983); *Fidelity Fed-*

(Continued on following page)

The instant case is no different. The central contention raised and rejected in the state system was that it would violate the federal constitution to apply the statute of repose—as resurrected by *Pullum* after the injury to Alberto Clausell, and after he had filed his state lawsuit—to divest the Clausells of their cause of action. At times, as we have emphasized, the Clausells raised that point in the context of an explicit declaration that to do so would be to render the statute unconstitutional as applied. At other times, both sides relied upon the shorthand inquiry—which eventually was certified to and answered by the Florida Supreme Court—of whether the federal constitution imposes any barrier to the retroactive application of the "*Pullum* decision." But this loose reference to the "*Pullum* decision" could only symbolize the parties' real inquiry—whether the Florida statute of repose, as resurrected by *Pullum,* might constitutionally be applied to divest the Clausells of a cause of action which was perfectly viable (because the earlier *Battilla* decision had voided the statute) at the time it arose and at the time it was filed.

That inquiry was inherent in the issue debated and decided in the Florida system, because the *Pullum* decision did not create a judge-made rule of repose, but

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Footnote continued—

eral Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 149-50 (1982); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 79-80 (1980); *People of State of Illinois ex rel. McCollum v. Board of Education, School District No. 71, Champaign County, Ill.,* 333 U.S. 203, 206 (1948); *James Stewart & Co. v. Sadrakula,* 309 U.S. 94, 97 (1940); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). *See also Franchise Tax Board of California v. United States Postal Service,* 467 U.S. 512, 515 n.7 (1984); *McCarty v. McCarty,* 453 U.S. 210, 219-20 n.12 (1981); *California v. Grace Brethren Church,* 457 U.S. 393, 405-06 (1982); *United States v. Knox,* 396 U.S. 77, 79 (1969).

rather sustained a statute of repose, as created by the legislature.[9] Since *Pullum* created no substantive law, but merely upheld a legislative act, the application of *"Pullum"* must always signify the application of the statute which *Pullum* upheld; and the Clausells' explicit constitutional challenge to the retroactive application of *"Pullum"* necessarily signified their constitutional objection to the retroactive application of the statute as revived by *Pullum.* As in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829), the Clausells' "declaration is founded upon that act," and "[t]hey do not claim for themselves any right independent of it."[10] Thus, when the Florida Supreme Court rejected their challenge, it necessarily held that the statute was not unconstitutional as applied. As in *Willson,* "the constitutionality of the act was the question, and the only question, which

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9. If the Florida Supreme Court in *Pullum* had purported to create a judge-made rule of repose, such a statewide rule of court—when upheld against constitutional challenge, as in the instant case—might also properly reach this Court under § 1257(2). *See, e.g., Application of Griffiths,* 413 U.S. 717, 718 (1973) (rules promulgated by judges and administered by state bar are statutes within the meaning of § 1257(2)); *Mayer v. City of Chicago,* 404 U.S. 189, 191-93 & n.2 (1971) (rule established by court under broad legislative delegation of authority to amend statutory provisions governing criminal appeals held to be a statute under § 1257(2)); *Lathrop v. Donohue,* 367 U.S. 820, 824-25 (1961) (rule established by state Supreme Court may be statute within meaning of § 1257(2), even absent delegation of authority by legislature to establish the rule).

10. *See New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928) ("There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented").

could have been discussed in the state Court." It is inherently impossible to construe the Florida Supreme Court's decision any other way.[11]

THE QUESTION IS SUBSTANTIAL

It requires little demonstration that "the right to due process reflects a fundamental value in our American constitutional system"; that "[i]t is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement"; and that for plaintiffs as well as defendants, "this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." *Boddie v. Connecticut,* 401 U.S. 371, 374, 375, 377 (1971). *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). Thus, for the Clausells and those similarly situated, the stakes in this case could not be higher, and in that sense the issue is substantial.

It is also substantial because the Florida Supreme Court's error has far-reaching ramifications for the protection of federal rights in state court. It would be inappropriate to undertake here a comprehensive treatment of the substantive question, but three central points inform that discussion. First, the Clausells' cause of action was perfectly viable at the time of Alberto Clausell's injury, and at the time the Clausells filed suit, because the *Battilla* decision was in force, and had declared the

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11. In an abundance of caution, we ask the Court in the alternative, on the basis of the arguments advanced next, to consider the instant jurisdictional statement as a petition for a writ of certiorari, under 28 U.S.C. § 2103. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 470 n.12 (1985); *Calder v. Jones,* 465 U.S. 783, 788 n.7 (1984).

statute of repose unconstitutional as applied to products-liability cases. As this Court has stated, an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[12] This point has never been addressed by Hobart or by any of the three Florida courts to consider this issue; it stands unrebutted.

Second, the Clausells' cause of action in tort was a federal property right of constitutional dimension. As a general proposition, as the Florida Supreme Court noted (A3), "[a] person has no property, no vested interest, in any rule of the common law," *In Re Second Employers' Liability Cases,* 223 U.S. 1, 50 (1912); and the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[13] And it follows, as the Florida Supreme Court noted (A3), that "[o]f

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12. *Norton v. Shelby County,* 118 U.S. 425, 442 (1886), *quoted in Linkletter v. Walker,* 381 U.S. 618, 623 (1965). Of course, an unconstitutional statute may confer property rights during the period before it is overturned, *see Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374-75 (1939). But the instant case concerns events which occurred after the statute had been declared unconstitutional, and the federal rule is that such a statute is a nullity. The Florida rule is the same: *State ex rel. Nuveen v. Greer,* 88 Fla. 249, 102 So. 739, 743-45 (1924) (unconstitutional statute "inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights"); *Ex Parte Messer,* 87 Fla. 92, 99 So. 330, 333 (1924) (unconstitutional statute is "void").

13. *Silver v. Silver,* 280 U.S. 117, 122 (1929), *quoted in Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n.32 (1978). *See Martinez v. California,* 444 U.S. 277, 281-83 (1980) (upholding, as rationally related to a legitimate governmental objective, a state statute immunizing public entities and employees from liability for injuries resulting from the parole or release of prisoners).

course, the state remains free to create substantive defenses or immunities for use in adjudication . . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (*dictum*). But these observations, which the Florida court found dispositive, only begin the inquiry, because the cited cases say only that generally there is no property right in a given state of law before it gives rise to a cause of action. Even that pronouncement is subject to qualification,[14] and it says nothing about the retroactive abolition or amendment of a cause of action which already had arisen under the prior law. Although, in the abstract, the state may have had no obligation to create the cause of action in the first place, and is free to amend or even abolish it, it is not wholly free to ignore the rights or expectations which arose before its amendment or abolition, because they have "acquired an independent existence competent to survive the destruction of the provision which gave [them] birth." *Coombes v. Getz*, 285 U.S. 434, 442 (1932). *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374-75 (1939).

Nor is there any question that a state's common-law tort action is a property interest sufficient to trigger such scrutiny. The Court has stated directly that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 422, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

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14. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (as long as the state maintains an action for employment discrimination, it may not, even prospectively, create procedural barriers which deny potential claimants a meaningful opportunity to pursue their claims); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (same rationale for striking down divorce filing-fee requirement, as applied, even prospectively, to welfare recipients).

Logan relied in part upon *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), which struck down, as applied to welfare recipients, a state statute imposing filing fees in divorce actions: "[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The *Logan* decision cited *Boddie* with approval, while observing that rights incident to a divorce "may not be a property interest in the same sense as a tort or a discrimination action." 445 U.S. at 430 n.5. And the *Logan* court was unimpressed by the argument accepted in the two federal district-court decisions cited by the Florida Supreme Court here (A4)—that before it is reduced to a judgment, a cause of action is a mere intangible expectancy which is not entitled to constitutional protection. To the contrary, the Court said in *Logan*, "[a] claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a . . . standard . . . based upon the substantiality of the evidence." 455 U.S. at 432. Such a right "presumably can be surrendered for value," and is "at least as substantial" as the right to an education, or the right to a horse-trainer's license, which the Court in prior cases had found to be protected. *Id.* Even this abbreviated discussion should leave little question that after it arises, a state-created cause of action in tort is a federal property right.[15]

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15. *See generally Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (even if not a vested right, "the right to sue [in tort] is a 'species of property' " under the due process clause); *Mathis v. Eli Lily and Co.*, 719 F.2d 134, 141 (6th

(Continued on following page)

Third, no state interest is sufficiently compelling to override the Clausells' pre-existing constitutional rights. This is an issue which has never been addressed by Hobart in the course of these proceedings; it has contended only that no federal property rights are involved. We think that omission constitutes a concession by Hobart, and that it is far too late for Hobart to invoke new arguments now. *See International Brotherhood of Electrical Workers v. Hechler,* 55 U.S.L.W. 4694, 4697-98 n.5 (U.S. May 26, 1987) ("[I]t is too late in the day for respondent to present to the Court this new-found legal theory"). In any

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Footnote continued—

Cir. 1983) (state tort claim becomes a vested property right when injury occurs); *Holman v. Hilton,* 712 F.2d 854, 858 (3d Cir. 1983) (state tort claim is a federal property right); *Dague v. Piper Aircraft Corp.,* 513 F. Supp. 19, 26 (N.D. Ind. 1980). *See also Gilmere v. City of Atlanta, Georgia,* 737 F.2d 894, 900 n.13, 910-11 n.39 (11th Cir.), *receded from on other grounds,* 774 F.2d 1495 (11th Cir. 1984) (en banc), *cert. denied,* ..... U.S. ....., 106 S. Ct. 1970, 90 L. Ed.2d 654 (1986); *American Druggists Ins. Co. v. Bogart,* 707 F.2d 1229, 1236-37 (11th Cir. 1983). *Compare State of Louisiana ex rel. Folsom v. Mayor of the City of New Orleans,* 109 U.S. 285 (1883) (no deprivation of property in state statute reducing municipality's taxing authority and thereby undermining its ability to satisfy a pre-existing tort judgment, because the municipality's liability, and thus the plaintiffs' property interests, were not disturbed, and their judgment might be satisfied in the future or in other ways); *Hammond v. United States,* 786 F.2d 8, 13 (1st Cir. 1986) (upholding substitution of federal tort-claims remedy for state common-law tort action, in part because "this case does not involve someone burdening or blocking plaintiff's right of access to the courts. . . . This is a matter of Congress altering her prior rights and remedies"); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1310 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S. Ct. 612, 58 L. Ed.2d 677 (1978) (cited by the Florida Supreme Court, A3) (no property right in tort claim which arose after effective date of new statute); *Jones v. Wyeth Laboratories, Inc.,* 457 F. Supp. 35, 37 (W.D. Ark.), *aff'd,* 583 F.2d 1070 (8th Cir. 1978) (plaintiff innoculated after effective date of statute; "prospective cause of action could be abolished and the statutory remedy envisioned by the Swine Flu Act substituted").

event, we cannot imagine a state interest of sufficient "overriding significance" to warrant the abolition of the Clausells' pre-existing property rights, *Boddie v. Connecticut*, 401 U.S. at 377, in light of the less-restrictive alternative of applying the newly-validated statute prospectively to accommodate both the pre-existing rights of litigants and the legislative objectives embraced by the statute, *see id.* at 431-32 (discussing less-restrictive alternatives); and in light of the fact that the Florida Legislature now has abolished the statute of repose in product-liability cases, and thus it is no longer a reflection of Florida's public policy. *See supra* p. 5.

It is respectfully submitted that the Clausells' cause of action was viable at the time it arose and was filed, because the *Battilla* decision had declared the statute of repose unconstitutional; that such a cause of action is a property right under federal constitutional law; and that no governmental interest warranted its retroactive usurpation, after the statute's resurrection in *Pullum*. The Clausells' right of action—their right of access to the Florida courts—could not be more fundamental. We respectfully submit that a significant federal question is presented by this case.

CONCLUSION

For the reasons provided above, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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February 19, 1988

APPENDIX

Alberto CLAUSELL, et al.,
Petitioners,

v.

HOBART CORPORATION,
Respondent.

No. 70566.

Supreme Court of Florida.

Dec. 3, 1987.

Appeal was taken from the decision of the Circuit Court, Dade County, Phillip W. Knight, J., in product liability action. The District Court of Appeal, 506 So.2d 1160, affirmed and certified questions of great public importance. Application for review was granted. The Supreme Court, Grimes, J., held that plaintiff had no vested right in cause of action and, therefore, would suffer no deprivation of due process by retroactive application of Supreme Court opinion.

Questions answered.

Constitutional Law (Key) 253(4)

Plaintiff had no vested right in cause of action and, therefore, would suffer no deprivation of due process by retroactive application of Supreme Court opinion, which upheld validity of statute of repose in product liability action and which overruled prior decision finding statute unconstitutional. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. §§ 95.031, 95.031(2).

Joel S. Perwin of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., and Spence, Payne, Masington, Grossman & Needle, P.A., Miami, for petitioners.

James E. Tribble and Anthony D. Dwyer of Blackwell, Walker, Fascell & Hoehl, Miami, for respondent.

GRIMES, Justice.

We review *Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987), to answer three certified questions of great public importance. Art. V, § 3(b)(4), Fla.Const. The certified questions are as follows:

> I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS. SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?
>
> II. IF NOT, WHETHER THE DECISION OF *PULLUM v. CINCINNATI, INC.*, 476 SO.2D 657 (FLA.1985), *APPEAL DISMISSED*, 475 U.S. 1114, 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA v. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA.1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION?
>
> III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE

THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

Id. at 1160-61. We recently answered the first question in the negative and the second question in the affirmative in *Melendez v. Dreis & Krump Manufacturing Co.*, 515 So.2d 735 (Fla.1987).

With reference to the third certified question, Clausell argues that the retroactive application of *Pullum* to his cause of action violates his right to due process under the United States Constitution. We find this claim unfounded. Several years ago in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, 98 S.Ct. 2620, 2638, 57 L.Ed.2d 595 (1978), the United States Supreme Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" *See also Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) ("it is well settled that a plaintiff has no vested right in any tort claim for damages under state law"). More recently, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the Court acknowledged that a cause of action is a species of property but pointed out that the state remained free to create substantive defenses or immunities for use in adjudication.

The Federal District Court in *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F.Supp. 1144 (S.D.Fla.1986), rejected the very argument advanced by Clausell when it stated:

> While the instant Plaintiff correctly posits that a statute may not be retroactively applied to deprive a party of a vested right, such a situation simply does not exist here. "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment." *In re Will of Martell,* 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). "To be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law;* it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Division of Workers' Compensation v. Brevda,* 420 So.2d 887, 891 (Fla. 1st DCA 1982) (emphasis added). The Plaintiff in the instant case had no vested contract or property right prior to the *Pullum* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages.

631 F.Supp. at 1149.

Another federal district court reached the same conclusion in *Eddings v. Volkswagenwerk, A.G.,* 635 F.Supp. 45 (N.D.Fla.1986), when it said:

> *Pullum,* receding from *Battilla,* held the statute was not unconstitutional. No cause of action was created by the statute and *Battilla* vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be consti-

> tutional, could not and does not deprive them of any vested rights.

Id. at 47.

Section 95.031 provided a defense to a cause of action rather than creating a cause of action. In *Battilla* the court simply held section 95.031(2) unconstitutional as applied to the facts of that case. When *Pullum* was decided, the statute became valid *ab initio* and was restored to its operative force. Since Clausell had no vested right in his cause of action, he suffered no deprivation of due process under the United States Constitution. Consequently, we answer the third certified question in the negative and approve the decision of the district court of appeal.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT and KOGAN, JJ., concur.

Alberto CLAUSELL and Patricia Clausell,
Appellants,

v.

HOBART CORPORATION,
Appellee.

No. 86-924.

District Court of Appeal of Florida,
Third District.

May 12, 1987.

An Appeal from the Circuit Court for Dade County; Phillip W. Knight, Judge.

Spence, Payne, Masington, Grossman & Needle, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin and Joel S. Perwin, Miami, for appellants.

Blackwell, Walker, Fascell & Hoehl and James E. Tribble and Angela L. DerOvanesian, Miami, for appellee.

Before DANIEL S. PEARSON and FERGUSON and JORGENSON, JJ.

PER CURIAM.

Affirmed on the authority of *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987). We certify the following questions to the Florida Supreme Court as questions of great public importance. As in *Shaw*:

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF RE-

POSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

II. IF NOT, WHETHER THE DECISION OF *PULLUM V. CINCINNATI, INC.*, 476 SO.2D 657 (FLA.1985), *APPEAL DISMISSED,* ..... U.S. ....., 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA V. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION.

And, additionally:

III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

Affirmed.

FERGUSON, Judge (specially concurring).

Affirmance is required by *Shaw;* however, in my view, as was stated in a concurring opinion in *Dominguez v. Bucyrus-Erie Co.*, 503 So.2d 364 (Fla. 3d DCA 1987), our first duty in construing a statute is to reconcile it with constitutional mandates. *See Biggs v. Smith,* 134 Fla. 569, 184 So. 106 (1938). That duty requires us to

give the statute retroactive application so as to open the court for redress in accordance with article I, section 21, of the Florida Constitution. The purpose of the constitutional provision is to give vitality to the maxim that for every wrong there is a remedy. *Holland ex rel. Williams v. Mayes,* 155 Fla. 129, 19 So.2d 709 (1944). Any claim of the parties to "vested rights" in pre-statute law is subordinate.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

GENERAL JURISDICTION DIVISION

CASE NO. 85-23505(CA25)

ALBERTO CLAUSELL and
PATRICIA CLAUSELL,
Plaintiffs,

vs.

HOBART CORPORATION,
Defendant.

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard on the Defendant's Motion for Summary Judgment based on the twelve (12) year Statute of Repose, F. S. 95.031(2). The Court has reviewed the file and the cases of *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (S. Ct. Fla. 1985), and *Battilla v. Allis Chalmers Manufacturing Company,* 392 So. 2d 874 (Fla. 1980), as well as the recent unreported decisions of *Thorsby v. Williams-White Company,* (U. S. D. Ct. Northern District, 84-7230 (1985); *Felder v. Heim Corporation,* 85-5487 (Fla. Cir. Ct. 17th Jud. Cir. 1985) and *Perez v. Ford Motor Company,* 82-23556, (Fla. Cir. Ct. 11th Jud. Cir. 1982), which discussed the retrospective application of the said F. S. 95.031(2) and the *Pullum* decision.

There is no dispute that the twelve (12) years had elapsed when the subject complaint was filed nor that

the accident occurred after the expiration of said twelve (12) year period.

The Supreme Court did not indicate that its decision in *Pullum* was prospective only and, unless it so limits its decision, every decision is retroactive. *Florida Forest & Park Service v. Strickland,* 18 So. 2d 251 (1944).

Therefore, although the Court has serious misgivings about the efficacy of padlocking the door to the Courthouse after a Plaintiff has suffered injuries, it is not the province of this Court to modify or ameliorate decisions of the Florida Supreme Court. Recourse lies elsewhere, i.e., it is suggested that the Florida Legislature enact a brief "saving period" of six months to one year post-accident. It is, accordingly,

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment be and the same is hereby granted and Judgement is entered for the Defendant and the Plaintiff shall go hence without day.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 14th day of March, 1986.

/s/ Phillip W. Knight
Phillip W. Knight
Circuit Judge

Copies furnished to:

Andrew Needle, Esquire
Charles P. Flick, Esquire

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,566

ALBERTO CLAUSELL and PATRICIA CLAUSELL,
Appellants,

vs.

HOBART CORPORATION,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alberto Clausell and Patricia Clausell, appellants above-named, hereby appeal to the Supreme Court of the United States from the decision of the Supreme Court of the State of Florida entered in this action on December 3, 1987. The decision approved a summary judgment for the appellee on the basis of Florida's statute of repose.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

By: /s/ Joel S. Perwin
Joel S. Perwin
Counsel for Appellant
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Of Counsel

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& Needle, P.A.
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2950 S.W. 27th Avenue
Miami, Fla. 33133

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of January, 1988, to: James Tribble, Esquire, Blackwell, Walker, et al., 2400 AmeriFirst Bldg., One S.E. Third Avenue, Miami, Fla. 33131.

By: /s/ Joel S. Perwin
Joel S. Perwin

SUPREME COURT OF FLORIDA
Tallahassee 32301

SID J. WHITE
Clerk
DEBBIE CAUSSEAUX
Chief Deputy Clerk

Telephone
904-488-0125

January 22, 1988

Hon. Joseph Spaniol
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: Alberto Clausell and
Patricia Clausell
v.
Hobart Corporation
Case No. 70,566

Dear Mr. Spaniol:

Enclosed herewith please find certified copy of Notice of Appeal filed in this Court on January 22, 1988 in the above styled case.

Most cordially,

Sid J. White
Clerk, Supreme Court
By: /s/ Betsy Hill
Deputy Clerk

SJW/bh
Enclosure
cc: Spence, Payne, Masington,
Grossman & Needle, P.A.
James Tribble, Esquire
Joel S. Perwin, Esquire

No. 87-1400

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALBERTO CLAUSELL and PATRICIA CLAUSELL,

Appellants,

vs.

HOBART CORPORATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS APPEAL

JAMES E. TRIBBLE, ESQ.
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March 21, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

LIST OF PARTIES

Pursuant to Rule 28.1, Supreme Court Rules, Appellee Hobart Corporation, provides the following listing of all of its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Parent–Company—

Premark International, Inc.

Subsidiaries and Affiliates—

DKI Commercial Equipment Holdings, Inc.
Cook Insurance Co. Limited
Hobart International Holdings, Inc.
Hobart International Inc.
The Stero Company
SC Bourgeois
Hobart Sales & Service
Hobart Europe S.A.
Tasselli
Compagnie Hobart, S.A.
Hobart A.G.
Vulcan-Hart Corp.
Hobart Maschinen B.M.B.H.
Hobart (Swiss) A.G.
Vulcan-Hart Canada, Inc.
Foster Refrigerator (U.K.) Limited
Hobart Manufacturing Company, LTD.
Hobart B.V.
Compagnie Hobart, S.A. Belge
Foster Subsidiaries
Hobart Equipment Leasing Limited
Premark Canada, Inc.

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Appellee Hobart Corporation, pursuant to Supreme Court Rule 16, files this motion to dismiss appeal on the grounds (1) that the Florida Supreme Court did not render a decision ruling on the validity of a statute so as to vest this Court with jurisdiction to entertain the appeal under 28 USC § 1257(2), and (2) that the appeal does not present a substantial federal question.

I. STATEMENT OF THE FACTS

This is a product liability action in which the plaintiffs, the Clausells, sued the defendant Hobart Corporation for damages arising from injuries sustained by Alberto Clausell while using a meat chopping machine manufactured and sold by Hobart some fourteen years before the accident. The trial court granted Hobart's motion for summary judgment on the ground that the action was barred by the Florida statute of repose, section 95.031(2) Florida Statutes (1985), which provided in pertinent part:

> (2) Actions for products liability under s. 95.11 (3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

The factual chronology on which Appellants base their constitutional argument can be summarized as follows:

— May, 1969: The meat chopper in question was manufactured and sold by Appellee Hobart.

— 1975: Florida's statute of repose, section 95.031 (2), Florida Statutes, became law.

— December 11, 1980: The Supreme Court of Florida decided *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam) holding that, as applied to a product-liability action, the statute of repose was unconstitutional because it "denies access to courts under Article I, Section 21, Florida Constitution."

— September 1, 1983: Appellant Alberto Clausell was injured while using Hobart's machine.

— June 7, 1985: The Clausells filed their lawsuit against Hobart.

— August 29, 1985: The Supreme Court of Florida decided *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), which receded from *Battilla* and held that section 95.031(2) is not unconstitutional.

— March 19, 1986: Trial court entered final summary judgment for Hobart on the basis of the statute of repose.

The Florida intermediate appellate court affirmed the summary judgment based on Florida's statute of repose and certified to the Florida Supreme Court three questions of great public importance:

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

II. IF NOT, WHETHER THE DECISION OF *PULLUM V. CINCINNATI, INC.*, 476 SO.2D 657 (FLA. 1985), *APPEAL DISMISSED*, — U.S. —, 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA V. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION.

III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

Clausell v. Hobart Corp., 506 So.2d 1160 (Fla. 3d DCA 1987). The Florida Supreme Court answered the first and third questions in the negative, and the second question in the affirmative, thereby approving the decision of the intermediate appellate court. *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987).

This appeal followed.

LEGAL ARGUMENT

Appellants seek review in this Court, pursuant to 28 USC § 1257(2),[1] of a decision of the Florida Supreme Court affirming a summary judgment in favor of the Appellee on their personal injury claim on the ground that it was barred by Florida's statute of repose, section 95.031(2), Florida Statutes (1985). Appellants assert that a significant federal question is presented by this case—specifically, whether the application of the statute of repose to their claim deprived them of a federal property right in violation of the due process clause of the United States Constitution.

The Court should note at the outset that though Appellants purport to direct their constitutional attack against the statute as applied to them, that is not the real basis for their argument. They make no constitutional assault on the statute itself,[2] nor do they contend that there is any constitutional impediment to the application of the literal terms of the statute to them. The real target of their due process argument is Florida's decisional law,

---

[1] It is Appellee's position that this Court does not have jurisdiction under 28 U.S.C. 1257(2) because there was no ruling by the Florida Supreme Court on the validity of the statute itself. We note, however, that the Appellants have requested that, in the alternative, this Court treat their Jurisdictional Statement as a petition for writ of certorari. *See* Jursdictional Statement at 19, n.11. If this Court decides to treat Appellant's Jurisdictional Statement as a petition for writ of certiorari, Appellee requests that this Court treat its Motion to Dismss as its brief in opposition to certiorari.

[2] The obvious reason for the absence of such an attack is that it would be futile in light of the authorities hereinafter discussed.

under which any statute previously declared unconstitutional is deemed valid *ab initio* if the case which declared the statute invalid is later overruled. *Clausell v. Hobart,* 515 So.2d at 1276. *See also Christopher v. Mungen,* 61 Fla. 513, 55 So. 273, 280 (1911). It is to this common law rule, not the statute of repose itself, that this Court should direct its attention in determining whether it has jurisdiction of this appeal and whether a substantial federal question exists in this case.

The third certified question did not raise the issue of the constitutional validity of the statute of repose, and the opinion of the Florida Supreme Court did not pass on any such issue. The Florida Supreme Court merely rejected Appellants' assertion of a federal property right and held that the *Pullum* decision had rendered the statute valid *ab initio* notwithstanding *Battilla.* Since there was no ruling in favor of the validity of the statute itself in the face of an attack on constitutional grounds, there is no jurisdiction under 28 USC § 1257(2). *See Rohr Aircraft Corp. v. County of San Diego,* 362 U.S. 628, 629 (1960); *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-187 (1945); *Wilson v. Cook,* 327 U.S. 474, 482 (1946); *Jett Bros. Distilling Co. v. Carrollton,* 252 U.S. 1, 5 (1920).

The cases cited in the Jurisdictional Statement at note 3 do not support Appellants' contention that this Court has jurisdiction under 28 USC § 1257(2). Each of the cited cases involves a typical challenge to a state statute, *as applied,* on the grounds of repugnancy to the federal constitution. Those authorities are inapposite here, where the Florida Supreme Court merely rejected Appellant's

claim of a constitutionally protected vested right, without ruling on the constitutionality of the statute itself.

In support of their contention that this case involves a substantial federal question, Appellants raise three points:

> (1) Their cause of action was perfectly viable at the time of injury and at the time their suit was filed (Jurisdictional Statement, p. 19);
>
> (2) Their cause of action is a federal property right of constitutional dimension (Jurisdictional Statement, p. 20); and
>
> (3) No state interest is sufficiently compelling to override Appellants' pre-existing constitutional rights. (Jurisdictional Statement, p. 23).

Appellee's response is that (1) Appellants had no viable cause of action in tort under state law, and (2) they therefore were not deprived of any right protected under the due process clause of the fourteenth amendment to the United States Constitution.

There is no substantial federal question in this case because the determination of the retroactive application of state-court judicial decisions is for the court rendering the decision; federal constitutional law has no say in the retroactivity of such decisions. *See Wainright v. Stone,* 414 U.S. 21 (1973); *Linkletter v. Walker,* 381 U.S. 618 (1965); *United States v. Johnson,* 457 U.S. 537 (1982). Under Florida law a decision of a court of last resort which overrules a former decision or establishes previously unrecognized claims for relief is retrospective as well as prospective in its operation unless specifically declared by the decision to have only a prospective effect.

Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). *Florida East Coast Railroad v. Rouse,* 144 So.2d 260 (Fla. 1967).

The collective import of the foregoing authorities is clear. After the Florida Supreme Court's decision in *Battilla,* which declared Florida's statute of repose unconstitutional, the statute was dormant, but not dead. The statute of repose existed within the statutes, and there was always the potential for the statute to be reactivated. *See State v. Lee,* 156 Fla. 291, 22 So.2d 804 (1945); *Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), *aff'd,* 835 F.2d 1369 (11th Cir. 1988). Thus, when the Florida Supreme Court receded from *Battilla* in *Pullum* and held that the statute of repose was not unconstitutional, (without specifically limiting the effect of *Pullum* to prospective application) the statute was thereby rendered valid from its inception. *Clausell v. Hobart Corp.,* 515 So.2d at 1276.

According to Florida law, the statute of repose is deemed valid on September 1, 1983, the day Appellant Alberto Clausell was injured and on June 7, 1985, the day Appellants filed their suit against Appellee, notwithstanding the temporary dormancy of the statute during the *Battilla* interlude. Because the injury occurred and the suit was filed more than twelve years after the machine in question was delivered to its original purchaser, the statute of repose prevented what might otherwise have been a cause of action for Appellants from ever arising.

Their cause of action never came into existence, because it had already been extinguished by the twelve-year statute before the injury occurred. The alleged harm was

damnum absque injuria, a wrong for which the law affords no redress. *See Hartford Fire Ins. Co. v. Laurence, Dykes, Goodenburger,* 740 F.2d 1362, 1367 (6th Cir. 1984); *Lamb,* 631 F.Supp. at 1147; *Dague v. Piper Aircraft Corp.,* 513 F.Supp. 19, 26 (N.D. Ind. 1980). Appellants clearly could have no federally protected property right in a claim which was non-existent under state law.

Appellants assert that the statute of repose was a nullity at the time their cause of action arose and at the time their complaint was filed because an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed." *See* Jurisdictional Statement at 20, *citing Norton v. Shelby County,* 118 U.S. 425, 442 (1886). That argument totally misapprehends the effect given by the Florida Supreme Court to a decision overruling a prior decision holding a statute unconstitutional. As shown above, the unconstitutional statute is treated as if it were valid from its adoption, as if it had never been ruled unconstitutional. This rule is exclusively a matter of state concern and does not give rise to any federal questions. The federal rule set forth in *Norton* does not hold otherwise.

The attempt by Appellants to create a question of constitutional significance is a futile effort based on faulty logic. Two factors combined to produce the ruling below: (1) The statute of repose itself, and (2) Florida's case law that a decision overruling a prior decision which declared a statute unconstitutional relates back to render the statute valid *ab initio.* These two factors, considered either separately or in tandem, do not give rise to any substantial federal question in this case.

There is obviously no constitutional infirmity in the statute of repose itself. Appellants seem to concede that by stating, at page 21 of their Jurisdictional Statement, that the state was "free to amend or even abolish" their cause of action. In any event, it has long been recognized as a general rule that state statutes of limitations and of repose do not violate the due process clause of the fourteenth amendment.[3] Appellants' claim could, therefore,

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[3] *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922) (state statute of limitation that prescribed the time for bringing suits which attack patents from the state or transfers of property by state's subdivisions held not offensive to federal due process); *Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (upholding state's ten-year statute of repose in product liability actions against attack on due process grounds); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger*, 740 F.2d 1362 (6th Cir. 1984) (upholding state statute of repose relating to designers and builders of property improvements against constitutional attack on due process grounds); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971) (state's recognition that a defendant has an interest in repose and in the avoidance of stale claims does not deprive the plaintiff of any constitutional right to fair or equal treatment); *Hargraves v. Brackett Stripping Mach. Co.*, 317 F.Supp. 676 (E.D. Tenn. 1970) (statutes of limitation are within the sovereign power of each state to enact and are not subject to constitutional attack for lack of due process absent a showing of arbitrariness or capriciousness).

Significantly, this Court's dismissal of *Pullum* for want of a substantial federal question indicates that this Court did not find that Florida's statute of repose violated any provision of the federal constitution. *See Pullum v. Cincinnati, Inc.*, 475 U.S. 1114 (1986); *Hicks v. Miranda*, 422 U.S. 332 (1975) (dismissal for lack of federal question may be considered a decision on the merits); *Mandel v. Bradley*, 432 U.S. 173, 180 (1977) (Brennan, J. concurring) (summary dispositions such as dismissals for lack of substantial federal question should be accorded appropriate, but not necessarily conclusive, weight).

consistent with due process, be extinguished by direct application of the statute of repose.

It logically follows that there is likewise no impairment of any due process rights when the same claim is extinguished through application of Florida's decisional law, which views the statute of repose as valid *ab initio,* despite the erroneous prior ruling in *Battilla* that it was invalid. If the Appellants had no property rights protected under the fourteenth amendment from extinguishment by the statute of repose, they likewise had no such rights which could not be terminated by operation of Florida's decisional law reinstating the statute. This is especially so since a state court's treatment of its decisions as prospective or retrospective is not a matter of federal concern under the United States Constitution.[4]

Appellants contend that their cause of action in tort was a federal property right of constitutional dimension. Further, Appellants assert:

> Although, in the abstract, the state may have had no obligation to create the cause of action in the first place, and is free to amend or even abolish the cause of action, it is not wholly free to ignore the rights or expectations which arose before its amendment or

---

[4] *See Wainwright, Linkletter,* and *Johnson, supra,* cited at page 6 of this motion. *See also, Cassidy v. Firestone Tire and Rubber Co.,* 495 So.2d 801 (Fla. 1st DCA 1986), *petition for review denied,* 506 So.2d 1040 (Fla.), *cert. denied,* 56 U.S.L.W. 3240 (U.S. Oct. 5, 1987) (No. 86-2041), wherein the petitioner challenged the retroactive application of the *Pullum* decision to bar his claim. For the same reasons set forth in note 3, *supra,* this Court's summary disposition of *Cassidy* may also be viewed as a decision on the merits which establishes that no substantial federal question exists on the issues raised on this appeal.

> abolition, because they "acquired an independent existence competent to survive the destruction of the provision which gave them birth."

See Jurisdictional Statement at 21, *citing Coombes v. Getz,* 285 U.S. 434, 442 (1932).

This argument by Appellants does not fit this case. Although there may indeed be circumstances, as in *Coombes,* where the rights of litigants attain an "independent existence" which constitutionally precludes their impairment, no such circumstances exist here. At the time of the *Pullum* decision, Appellants had no rights comparable to the contract rights held to exist in *Coombes.* In *Coombes,* because the petitioners had vested contract rights, those rights were said to stand independent of the statute that created them; accordingly they could not be abrogated by a subsequent change in the law, without violating both the impairment of contract and due process provisions of the United States Constitution. Neither in *Coombes* nor in the cases cited therein was any tort cause of action or a right derived from tort held to be "vested." The present case involves common law tort rights that are nothing like the vested contract rights in *Coombes;* Appellants were merely pursuing a common law tort theory to recover damages.

The Florida Supreme Court correctly recognized below that a plaintiff has no vested right in any rule of common law or in any tort claim. *Clausell v. Hobart Corp.,* 515 So.2d at 1277-1278, *citing Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978) and *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307 (5th Cir.) *cert. denied* 439 U.S. 1002 (1978). *See also*

Hammond v. United States, 786 F.2d 8, 13 (1st Cir. 1985). The mere prospect that a plaintiff might recover damages on a tort theory is not tantamount to a vested right. *See Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), *aff'd,* 835 F.2d 1369 (11th Cir. 1988). Appellants did not receive, by virtue of *Battilla,* an absolute assurance that the statute of repose would remain forever abrogated. *See Lamb* at 1150. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. *Lamb,* 631 F.Supp. at 1149, *citing Division of Workers' Compensation v. Brevda,* 420 So.2d 887 (Fla. 1st DCA 1982).

The cases cited by Appellants to support their contention that their tort claim was a constitutionally protected property right are inapposite. Appellants argue based on *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) and *Boddie v. Connecticut,* 401 U.S. 371 (1971), that their cause of action was a species of property protected by the fourteenth amendment. *Logan* involved a suit by a discharged employee under a state's fair unemployment practices act for discriminatory employment practices. The complainant's cause of action was terminated because a state officer, for reasons beyond the complainant's control, failed to comply with a statutorily mandated hearing procedure. On appeal, the complainant challenged the termination of his cause of action as a violation of due process. This Court agreed. In reversing the Illinois Supreme Court's affirmance of the dismissal of the employee's claim, this Court held that a plaintiff cannot be deprived of a statutorily created cause of action

by the wholly arbitrary and irrational acts of state officials. *Logan,* 455 U.S. at 431-32.

As the Florida Supreme Court opinion below noted, however, this Court in *Logan* specifically recognized that the state remains free to create substantive defenses or to eliminate its statutorily created causes of action altogether. *Clausell v. Hobart Corp.,* 515 So.2d at 1276, citing *Logan,* 455 U.S. at 432. In fact, *Logan* acknowledged that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest in protecting individual citizens from state action that is wholly arbitrary or irrational. *Id., citing Martinez v. California,* 444 U.S. 277 (1980).

In *Boddie,* indigent parties seeking access to state courts to obtain divorces challenged on due process grounds a state's requirement that all parties filing actions pay court fees and service of process fees. This Court held in *Boddie* that the fee requirement was a violation of the indigent parties' due process rights because the state monopolized the means for legally dissolving the marriage relationship and resort to the judicial process was not voluntary. This Court specifically restricted its holding in *Boddie* by stating, "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause of the fourteenth amendment so that its exercise may not be placed beyond the reach of any individual." *Boddie,* 401 U.S. at 382-83.

Taken together, the import of *Logan* and *Boddie* is that where a state recognizes a statutorily created cause of action or specifically requires its citizens to submit to

judicial process, it can deny its citizens neither their recognized cause of action nor the required access to its courts without due process of law.

Unlike *Logan* and *Boddie,* this case does not involve arbitrary and irrational actions by state officials in denying an individual litigant a recognized cause of action or access to the courts where the state has determined that resort to judicial process is mandatory. To the contrary, it involves a determination of the law with respect to all litigants by the state's highest court. As *Logan* clearly establishes, the state was free to eliminate a cause of action altogether, and the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. *Logan,* 455 U.S. at 432-33.

Finally, Appellants' third point is that "no state interest is sufficiently compelling to override the Clausells' pre-existing constitutional rights." The point is ill-founded because the "compelling state interest" standard urged by Appellants is not the correct standard by which state action is to be measured in this case.[5] In order to satisfy the due process requirements there must be a rational relationship between the state's purposes and the application of the statute. *Martinez v. California,* 444 U.S. 277 (1980). The rational relationship between the state's purpose in enacting the statute of repose and the application

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[5] In their Jurisdictional Statement, Appellants assert that this issue has not previously been addressed by Appellee Hobart and that Hobart has, therefore, conceded this point. As pointed out above, it is Appellee's position, as consistently maintained throughout these proceedings, that a different standard altogether applies.

of *Pullum* which reinstated that statute *ab initio* can best be discerned from the purpose of the statute of repose itself. The Florida statute of repose was intended to curtail the perpetual liability of manufacturers, because such liability places an undue burden on maufacturers. *See Pullum,* 476 So.2d at 659. The entire purpose in cutting off the right of action after a specified time would be totally undermined by creating exceptions based upon the date of filing a lawsuit, rather than measuring the period of limitations from the date of delivery of the product. *See Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144, 1151 (S.D. Fla. 1986), *aff'd* 835 F.2d 1369 (11th Cir. 1988). Thus, there is a rational relationship between the state's purpose in enacting the statute and the retroactive application of *Pullum.*

In summary, no substantial federal question is presented by this case and the appeal should be dismissed. *Pullum,* overruling *Battilla,* validated the statute of repose from its effective date. Thus, notwithstanding the intermediate *Battilla* decision, Florida's twelve-year statute of repose was valid on September 1, 1983, the day Appellant Alberto Clausell was injured, and on June 7, 1985, the day Appellants filed suit against Appellee. Because the injury occurred and the suit was filed after the twelve-year statute had run, no cause of action in favor of Appellants arose. Appellants obviously could have no federally protected property right in a non-existent cause of action. Even if Appellants had a cause of action in tort against Appellees, such a cause of action does not rise to the level of a property right protected by the United States Constitution.

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CONCLUSION

Based upon the foregoing reasons and authorities, this appeal should be dismissed. If the Court should elect to treat the appeal as a petition for certiorari, the petition should be denied on the grounds that it presents no substantial federal question.

Respectfully submitted,

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No. 87-1400

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALBERTO CLAUSELL and PATRICIA CLAUSELL,
Appellants,

vs.

HOBART CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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QUESTION PRESENTED FOR REVIEW

Whether Florida's statute of repose, § 95.031(2), Fla. Stat. (1985), was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, when retroactively applied to divest the plaintiffs of a cause of action for personal injury which was not barred by the statute either at the time the cause of action arose, or at the time the action was filed.

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No. 87-1400

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Appellants,

vs.

HOBART CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellants Alberto and Patricia Clausell respectfully oppose appellee Hobart Corporation's motion to dismiss the instant appeal. The substance of our position is outlined in the Jurisdictional Statement; we offer the following points in reaction to the specific arguments raised by Hobart:

This Court Has Jurisdiction Under 28 U.S.C. § 1257(2).

Hobart's sole contention is that the Clausells' hopes were lost not by the application of a statute, but by the action of a court, which in turn applied not a statute, but a common-law, judge-made rule that previously-invalidated statutes which are resurrected should be considered valid *ab initio*. But the court employed that rule to enforce a statute, and it was the application of that

statute which divested the Clausells of their cause of action. The *Pullum* decision[1] neither created nor enforced a judge-made rule of substantive law; it upheld a statute. The *Clausell* decision (A1) neither created nor enforced a judge-made rule of substantive law; it applied and enforced a statute. It was a court which did that—not an executive officer—and it did so in part through judge-made rules—but the sole effect of its decision was to apply the statute to the Clausells' cause of action, and the Clausells' sole contention is that the statute is unconstitutional as so applied.

As we noted (Jurisdictional Statement at 12 & n.3), this Court has "held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 440-41 (1979). That standard is satisfied not merely by the incantation of "some abracadabra," *Flournoy v. Wiener*, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting), but also when "the question was necessarily decided, notwithstanding the failure or refusal of the state court to expressly and in terms pass upon the matter . . .," *Harding v. State of Illinois*, 196 U.S. 78 (1904)—that is, when it is "impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the State Court." *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).

In this context, it is not enough to protest (motion to dismiss at 5) that the question certified to the Florida

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1. *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

Supreme Court "did not raise the issue of the constitutional validity of the statute of repose," and that the "Florida Supreme Court merely rejected appellants' assertion of a federal property right and held that the *Pullum* decision had rendered the statute valid *ab initio* notwithstanding *Battilla*."[2] Hobart's job was to suggest some theory under which the Florida Supreme Court could have "merely rejected" that contention without necessarily upholding the application of the statute against constitutional challenge. As we emphasized, such an explanation is inherently impossible, and Hobart has not even attempted one. Since the Florida Supreme Court's decision necessarily applied the statute despite the Clausells' contention that to do so would violate their federal constitutional rights, this Court has jurisdiction under 28 U.S.C. § 1257(2).

This Case Presents a Substantial Federal Question.

Surprisingly, Hobart's primary position is not that the federal question is settled or insubstantial, but that there is no federal question at all. Hobart argues that "the determination of the retroactive application of state-court judicial decisions is for the court rendering the decision; federal constitutional law has no say in the retroactivity of such decisions" (motion at 6); that Florida's rule is that a resurrected statute is considered valid *ab initio* (motion at 6-8); and that "[a]ppellants clearly could have no federally protected property right in a claim which was non-existent under state law" (motion at 8). This suggestion proves far too much; it would

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2. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam).

wipe out 100 years of federal constitutional law. It is "true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws . . .," but "while it is for the State courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-81 (1930). The federal guarantee of due process would be fragile, indeed, if the State could avoid it by simply declaring retroactively that a right which it once acknowledged never really existed at all. As Justice Stewart wrote, "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). The Florida Supreme Court has recognized this principle, holding that "[w]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision retrospective operation." *Florida Forest and Park Service v. Strickland*, 18 So.2d 251, 253 (Fla. 1944).

This observation serves to answer Hobart's back-up contention (motion at 9-10) that if there is "no constitutional infirmity in the statute of repose itself," "[i]t logically follows that there is likewise no impairment of any due process rights when the same claim is extinguished through application of Florida's decisional law, which views the statute of repose as valid *ab initio* . . . ."

To the contrary, "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), *quoted in Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 730 (1984) ("[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects"). *See United States v. Locke*, 471 U.S. 84, 105 (1985); *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. at 733, *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938) ("retroactive application" impermissible if "so harsh and oppressive as to transgress the constitutional limitation"), *also quoted in United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).[3] Thus, as we emphasized (Jurisdictional Statement at 21), a governmental action which may be constitutionally-unobjection-

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3. Moreover, the rationality of a statute's application must be assessed at least in part by reference to the "form of property" interfered with, *Best v. Humbolt Placer Mining Co.*, 371 U.S. 334, 335 (1963), *quoted in United States v. Locke*, 471 U.S. 84, 104 (1985), and the "form of property" may be significantly different in the case of retroactively-applied legislation. The Clausells are in a very-different position from those who may have suffered a personal injury after the statute of repose was resurrected in *Pullum;* the Clausells were divested not of an inchoate right to bring an action which might arise in the future, but of an action which already had arisen. *See infra.* They had filed their cause of action in a jurisdiction which had no statute of repose (because it had been declared invalid), and they relied upon that state of law by hiring counsel and incurring the cost of litigation. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (reliance a relevant factor). And they were divested of that cause of action by an unexpected change of the law of which they had no notice. *See Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.), *quoted in United States v. Darusmont*, 449 U.S. 292, 298, 300 (1981) (per curiam). These considerations inhere in the retroactive application of legislation, and may be wholly inapplicable to its facial validity.

able in the abstract may nonetheless be impermissible when applied retroactively to disturb pre-existing rights.[4]

Perhaps because of these authorities, Hobart advances the tertiary position (motion at 11-12) that property rights of constitutional dimension may be found in contracts, as in *Coombes v. Getz, supra* note 4, but not in "any rule of common law or in any tort claim." These provide "a mere expectation based on an anticipation of the continuance of an existing law"—not "a title, legal or equitable, to the present or future enforcement of a demand." But that could be said of the prospective right to bring an action for employment discrimination, which the Court considered in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"; or of the prospective divorce action in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which the Court acknowledged in *Logan* to be a property right of constitutional dimension, although it "may not be a prop-

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4. *See generally Mullaney v. Wilbur*, 421 U.S. 684, 690 n.10 (1975) ("the retroactive application of the new interpretation was itself a denial of due process"); *Bouie v. Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right' "), *quoting Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-81 (1930) (while "[i]t is true that the courts of a state have a supreme power to interpret and declare the written and unwritten laws of the state," "a state may not deprive a person of all existing remedies for the enforcement of a right"); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (federal statute may have conferred property rights before declared invalid); *Coombes v. Getz*, 285 U.S. 434, 442 (1932) (contract created under old law survived its repeal); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910) (same); *Gelpcke*

(Continued on following page)

erty interest in the same sense as a tort or a discrimination action." 455 U.S. at 430 n.5. As we noted (Jurisdictional Statement at 22), the *Logan* Court rejected the suggestion made here by Hobart, holding that "[a] claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State," and his right to seek it "presumably can be surrendered for value . . . ." 455 U.S. at 432.

Hobart deals with *Logan* and *Boddie* not by adhering to its position that a tort claim is too inchoate to warrant constitutional protection, but by shifting to a fourth position (motion at 12-14)—that the governmental restrictions in *Logan* and *Boddie* were so "arbitrary and irrational" that they failed to justify the barriers to the litigants' access to court. That is equally true in the instant case, notwithstanding Hobart's suggestion (motion at 15) that the statute's purpose would be undermined if it failed to reach the largest possible number of cases—a suggestion which would uphold the retroactive application of all legislation. The Florida Supreme Court's application of the statute in the instant case was wholly irrational even from Hobart's perspective, because the statute already had been repealed at the time of that application (*see* Jurisdictional Statement at 5). At that time, there was no governmental interest of any nature to be balanced against the Clausells' constitutional rights, and thus no conceivable rationality to the statute as applied.

Footnote continued—

v. Dubuque, 68 U.S. (1 Wall.) 175, 17 L. Ed. 520 (1863) (bonds issued under apparent legislative authority were valid notwithstanding a subsequent state supreme-court decision that the legislature had no power to issue them).

CONCLUSION

For the reasons provided above, it is respectfully submitted that the appellee's Motion to Dismiss Appeal should be denied, and that this Court should note probable jurisdiction of this appeal.

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